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TERMINIX INTERNATIONAL, INC.,
THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP
(erroneously sued herein as The Terminix International Company),
THE SERVICEMASTER COMPANY,
SERVICEMASTER CONSUMER SERVICES, and
SERVICEMASTER CONSUMER SERVICES LIMITED PARTNERSHIP

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BARBARA NEU on behalf of herself and all
others similarly situated,

Plaintiff,

vs.

TERMINIX INTERNATIONAL, INC., THE
TERMINIX INTERNATIONAL COMPANY,
THE SERVICEMASTER COMPANY,
SERVICEMASTER CONSUMER SERVICES,
SERVICEMASTER CONSUMER SERVICES
LIMITED PARTNERSHIP,

Defendants.

) Case No. C 07-06472-CW

) **MOTION TO DISMISS**

) Complaint Filed: December 27, 2007

Defendants, TERMINIX INTERNATIONAL, INC., THE TERMINIX INTERNATIONAL
COMPANY LIMITED PARTNERSHIP, THE SERVICEMASTER COMPANY,
SERVICEMASTER CONSUMER SERVICES, INC., and SERVICEMASTER CONSUMER
SERVICES LIMITED PARTNERSHIP, by and through their attorney, Christopher J. Borders of
HINSHAW & CULBERTSON LLP, now move pursuant to Rule 12(b)(6) of the Federal Rules of
Civil Procedure to dismiss plaintiff's complaint. In support of their Motion, defendants state:

1 1. Plaintiff has filed a seven-count complaint alleging various wrongdoing in connection
2 with Terminix's termite service agreements. (See plaintiff's Complaint, attached as Ex. "A" to the
3 Memorandum of Law filed concurrently herewith).

4 2. Plaintiff brings the following claims against the defendants:

5 Count One: Breach of Contract and Warranty

6 Count Two: Equitable Relief

7 Count Three: Breach of Duty to Warn

8 Count Four: Negligent Training, Supervision and Retention

9 Count Five: California Unfair Competition Law (Business and Professions Code
10 §17500)

11 Count Six: California Unfair Competition Law (Business and Professions Code
12 §17200)

13 Count Seven: Violation of Consumers Legal Remedies Act (Civil Code § 1750, et
14 seq.)

14 **Legal Standard On Motion To Dismiss**

15 3. A motion to dismiss brought pursuant to Rule 12(b)(6) should be granted where a
16 complaint fails to state a claim upon which relief can be granted. FED.R.CIV. P. 12(b)(6); *see also*
17 *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1964-65 (2007)(holding "without some
18 factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of
19 providing not only 'fair notice' of the nature of the claim, but also [the] 'grounds' on which the
20 claim rests."). A federal complaint's factual allegations "must be enough to raise a right to relief
21 beyond the speculative level," and must demonstrate "a plausible entitlement to relief." *Bell Atlantic*,
22 127 S.Ct. at 1965-67.

24 4. In ruling on a motion to dismiss, a court should also not accept as true any
25 unsupported conclusions of fact or assertions involving mixed allegations of fact and law. A court
26 should also disregard legal conclusions that are either alleged or which can be inferred from the
27 allegations of the complaint.
28

5. Moreover, in order to state a valid claim for breach of contract, the terms of the contract must be set out verbatim in the body of the complaint, or a copy of the written instrument must be attached and incorporated by reference, or the contract must be pled according to its legal effect. *Campbell v. Allstate Ins. Co.*, No. CV-95-1171, 1995 WL 376926 (C.D. Cal. 1995); *Woods v. Asset Resources*, No. 1:06-cv-00398, 2006 WL 3782704 (E.D. Cal. 2006); FED. R. CIV. P. OFFICIAL FORM 3, 12. “To plead the legal effect of a contract, plaintiff[] must ‘allege the substance of its relevant terms.’” *Parrish v. National Football League Players Ass’n*, No. C07-00943, 2007 WL 2601385, *10 (N.D. Cal. 2007). “This is more difficult [than pleading the precise language], for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions.” *Id.*

6. Federal Rule of Civil Procedure 9(b) provides that “[i]n all averments of fraud . . . the circumstances constituting fraud shall be stated with particularity.” FED. R. CIV. P. 9(b). Further, where, as here, a plaintiff alleges fraudulent conduct under the Unfair Competition Law of Consumer Legal Remedies Act, such claims are subject to the particularity requirements of Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105-06 (9th Cir. 2003).

7. With these pleading standards in mind, defendants now turn to the legal grounds entitling them to a dismissal of plaintiff’s claims.

Grounds For Dismissal

8. Plaintiff’s claim for breach of contract and breach of warranty (Count One) is subject to dismissal because there is no contract attached as an exhibit to the complaint, no specific terms are set out verbatim, the specific terms of the alleged contract and/or warranty are not set forth in the complaint, and there are insufficient allegations for the defendants to ascertain what contract or contracts are involved, which provisions are claimed to have been breached, and what defenses (e.g., disclaimers, exclusions, limitations of liability) may be available.

1 9. Count Two (Equitable Relief) is subject to dismissal because equitable relief is not a
 2 separate cause of action. *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d
 3 1272, 1283 (S.D. Cal. 2002). Furthermore, plaintiff's request for equitable relief is deficient because
 4 nowhere in the plaintiff's complaint does she allege that she lacks an adequate remedy at law.
 5 *Lucasfilm Ltd. v. Media Market Gp., Ltd.*, 182 F.Supp.2d 897, 899 (N.D. Cal. 2002). Further, while
 6 plaintiff seeks reformation of contract, she has not alleged any of the elements required to establish
 7 such relief.

9 10. Counts Three (Breach of Duty to Warn) and Four (Negligent
 10 Training/Supervision/Retention) should be dismissed because they seek recovery in tort for
 11 economic losses, which is prohibited under the California economic loss doctrine. *Seely v. White*
 12 *Motor Co.*, 403 P.2d 145, 151-52 (Cal. 1965); *California Dept. of Toxic Subst. Control v. Payless*
 13 *Cleaners*, 368 F.Supp.2d 1069, 1084 (E.D. Cal. 2005); *County of Santa Clara v. Atlantic Richfield*
 14 *Co.*, 137 Cal. App. 4th 292, 318 (6th Dist. 2006). Alternatively, should the Court find that the
 15 negligence claims are not barred in their entirety, then Counts Three and Four are duplicative of one
 16 another.

18 11. Counts Five, Six and Seven, which seek recovery under Sections 17500 and 17200 of
 19 the Unfair Competition Law ("UCL") and Section 1750 of the Consumer Legal Remedies Act
 20 ("CLRA"), lack the specificity required under Federal Rule of Civil Procedure 9(b). Where, as here,
 21 a plaintiff alleges fraud under the UCL or CLRA, those claims are subject to the particularity
 22 requirements of Federal Rule of Civil Procedure 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
 23 1097, 1105-06 (9th Cir. 2003). Under Rule 9(b), averments of fraud must be accompanied by "the
 24 who, what, when, where and how" of the misconduct charged. *Vess*, 317 F.3d at 1106; *Cooper v.*
 25 *Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). Counts Five, Six and Seven of plaintiff's complaint
 26 contain no allegations regarding what specific misrepresentations were allegedly made, what specific
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 28

1 information was allegedly concealed, who made the alleged fraudulent statements and/or
 2 concealments, to whom the fraudulent statements were allegedly made, and when such
 3 misrepresentations were purportedly made.

4
 5 12. Lastly, plaintiff's Complaint does not properly state claims against The
 6 ServiceMaster Company, ServiceMaster Consumer Services, Inc., and ServiceMaster Consumer
 7 Services Limited Partnership. Plaintiff has not alleged that she had a contract with the
 8 ServiceMaster defendants and plaintiff's allegations otherwise fail to state any recognized cause of
 9 action against the ServiceMaster defendants.

10 13. Defendants incorporate herein by reference the arguments and authorities cited in
 11 their supporting Memorandum of Law.

12 WHEREFORE, defendants, TERMINIX INTERNATIONAL, INC., THE TERMINIX
 13 INTERNATIONAL COMPANY LIMITED PARTNERSHIP, THE SERVICEMASTER
 14 COMPANY, SERVICEMASTER CONSUMER SERVICES, INC., and SERVICEMASTER
 15 CONSUMER SERVICES LIMITED PARTNERSHIP, pray that this Honorable Court grant their
 16 Motion to Dismiss and dismiss the plaintiff's claims against them, award costs of this action and all
 17 other just and appropriate relief. Respectfully submitted,
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19
 20 DATED: February 29, 2008

HINSHAW & CULBERTSON LLP

21
 22 s/Christopher Borders

CHRISTOPHER J. BORDERS

Attorneys for Defendants

23 TERMINIX INTERNATIONAL, INC.,
 24 THE TERMINIX INTERNATIONAL COMPANY
 25 LIMITED PARTNERSHIP (erroneously sued herein as
 26 The Terminix International Company),
 27 THE SERVICEMASTER COMPANY,
 28 SERVICEMASTER CONSUMER SERVICES, and
 SERVICEMASTER CONSUMER SERVICES
 LIMITED PARTNERSHIP

I. INTRODUCTION

The plaintiff claims improprieties with respect to termite protection services provided at her home. However, rather than filing a clear, straightforward pleading that asserts her alleged claims against the company that provided the termite protection services, plaintiff's counsel has filed a convoluted pleading, lacking any specificity, against multiple parties, in the hope that such vagaries can enable the pursuit of a class action attacking the overall business practices of numerous parties. In fact, the plaintiff is so anxious to avoid limiting the lawsuit to her own circumstances that she does not attach the contract which forms the basis of her claims and does not quote a single word from the contract. For this reason, and for numerous other reasons, the Complaint is legally and factually deficient and should be dismissed.

II. STANDARD FOR MOTION TO DISMISS UNDER RULE 12(B)(6)

In *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1969 (2007), the Supreme Court adopted a pleading threshold requiring factual allegations establishing a plausible entitlement to relief.¹ The Court concluded that the oft-cited standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957)² should be retired, observing that the phrase "is best forgotten as an incomplete negative gloss on an accepted pleading standard."

Bell Atlantic did more than merely consign *Conley*'s "no set of facts" standard to retirement. It clarified the minimum pleading standards applicable under Rule 8(a)(2). While adhering to the notion that a plaintiff need not set out in great detail the facts upon which a claim is based, the Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of

¹ "In applying these general standards...we hold that stating such a claim requires a complaint with *enough factual matter* ... to suggest an agreement was made." *Bell Atlantic*, 127 S.Ct. at 1965 (emphasis added).

² Under *Conley*, "a complaint should not be dismissed ... unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

1 action will not do.” *Bell Atlantic*, 127 S.Ct. at 1964-65. The Court observed that “without some
2 factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of
3 providing not only ‘fair notice’ of the nature of the claim, but also [the] ‘grounds’ on which the
4 claim rests.” *Id.* at 1965.

5
6 *Bell Atlantic* held a federal complaint’s factual allegations “must be enough to raise a right to
7 relief beyond the speculative level.” 127 S.Ct. at 1965. That means a complaint’s factual allegations
8 must establish more than the “mere possibility” of liability; rather, they must demonstrate “a
9 plausible entitlement to relief.” *Id.* at 1966-67. *Bell Atlantic* also observed that under its “plausible
10 entitlement” standard “[i]t is not . . . proper to assume that [the plaintiff] can prove facts that it has
11 not alleged or that the defendants have violated the . . . laws in ways that have not been alleged.”
12 *Bell Atlantic*, 127 S.Ct. at 1969 n. 8, quoting *Associated Gen. Contractors of Cal., Inc. v.*
13 *Carpenters*, 459 U.S. 519, 526 (1983). At issue in *Bell Atlantic* was whether plaintiffs had pled
14 sufficient facts to establish the existence of an agreement or conspiracy between the defendants to
15 restrain trade in violation on §1 of the Sherman Act.³ *Bell Atlantic* held that the need “for
16 allegations plausibly suggesting (not merely consistent with) [an] agreement reflects the threshold
17 requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader
18 is entitled to relief.’” *Bell Atlantic*, 127 S.Ct. at 1966.

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22
23 ³ While *Bell Atlantic* involved an antitrust action under §1 of the Sherman Act, the decision cannot be limited to antitrust
24 claims. Nothing in *Bell Atlantic* suggests the Court was limiting its holding to the pleading requirements of antitrust claims.
25 The Court clearly meant to make a statement of general application pertaining to Rule 8(a)(2). The Court in *Bell Atlantic*
26 drew support for its holding from a series of pleading decisions, any number of which did not involve antitrust claims.
27 Indeed, *Conley* addressed a claim under the Railway Labor Act seeking to compel a collective bargaining agent to represent
28 the plaintiffs fairly. *Wilson v. Schnettler*, which the *Bell Atlantic* Court quoted with approval in its footnote 8, addressed the
pleading requirements for a §1983 false arrest claim. In *Papasan*, the Court addressed the factual sufficiency of an equal
protection claim. The *Dura Pharmaceuticals* decision cited with approval in *Bell Atlantic*, 127 S.Ct. at 1966 addressed the
factual allegations necessary to bring a claim under §10(b) of the Securities Exchange Act of 1934. Thus, *Bell Atlantic* is
not limited strictly to antitrust actions, but rather is an explicit declaration that greater factual specificity in complaints must
be supplied in order to stave off dismissal.

1 *Bell Atlantic* has been applied numerous times by the Northern District of California. See
2 e.g., *Van Slyke v. Capital One Bank*, 503 F.Supp. 2d 1353, 1358 (N.D. Cal. 2007) (citing *Bell*
3 *Atlantic's* holding that a plaintiff's obligation to provide the grounds of his 'entitlement to relief'
4 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of
5 action will not do."); *American Canine Foundation v. Sun*, No. C-06-4713, 2007 WL 4208358 (N.D.
6 Cal. Nov. 27, 2007)(noting that under *Bell Atlantic*, "[f]actual allegations must be enough to raise a
7 right to relief above the speculative level.").

9 In ruling on a motion to dismiss, a court should also not accept as true any unsupported
10 conclusions of fact or assertions involving mixed allegations of fact and law. *Hotel Employees and*
11 *Restaurant Employees Local 2 v. Vista Inn Mgmt. Co.*, 393 F.Supp.2d 972, 977 (N.D. Cal. 2005);
12 *Bell Atlantic*, 127 S.Ct. at 1965, quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986). A court
13 should also disregard legal conclusions that are either alleged or which can be inferred from the
14 allegations of the complaint. *In re Wal-Mart Stores, Inc. Wage and Hour Litigation*, 505 F.Supp.2d
15 609, 613-14 (N.D. Cal. 2007). "[C]onclusory allegations of law and unwarranted inferences will not
16 defeat a motion to dismiss for failure to state a claim." *Id.*

18 Applying the standard set forth in *Bell Atlantic* to the claims now before this Court, the
19 defendants explain in the following sections of this Memorandum how *Bell Atlantic* warrants
20 dismissal of the plaintiff's claims.

22 III. ARGUMENT

23 **A. Plaintiff Has Not Properly Pled Breach of Contract or Warranty.**

24 Plaintiff's claim for breach of contract and breach of warranty is subject to dismissal because
25 the terms of the contract are not set out verbatim in the body of the Complaint or incorporated by
26 reference to an attached copy of the written instrument. In *Campbell v. Allstate Ins. Co.*, No. CV-
27 95-1171, 1995 WL 376926 (C.D. Cal. 1995), the court held that in order to state a valid claim for
28

1 breach of contract, "the terms of the contract must be set out verbatim in the body of the complaint
2 or a copy of the written instrument must be attached and incorporated by reference." *Campbell*,
3 1995 WL 376926, at *2. *See also Woods v. Asset Resources*, No. 1:06-cv-00398, 2006 WL 3782704
4 (E.D. Cal. 2006)("[i]f the contract is written, the terms must be set forth verbatim or a copy attached
5 and incorporated by reference.").

6
7 Further, the Notes to the Forms appended to the Federal Rules of Civil Procedure state that
8 "plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or
9 plead it according to its legal effect." NOTE TO FED. R. CIV. P. OFFICIAL FORM 12; *see* OFFICIAL
10 FORMS 3, 12. "To plead the legal effect of a contract, plaintiffs must 'allege the substance of its
11 relevant terms.'" *Parrish v. National Football League Players Ass'n*, No. C07-00943, 2007 WL
12 2601385, at *10 (N.D. Cal. 2007). "This is more difficult [than pleading the precise language], for it
13 requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal
14 conclusions." *Id.*

15
16 Plaintiff's Complaint (attached hereto as Exhibit "A") generally asserts that she and proposed
17 class members have suffered damage as a result of Terminix's failure to comply with various
18 obligations and warranties contained in termite agreements. (Ex. "A," ¶21). There is no contract
19 attached as an exhibit to the Complaint and no specific contract terms are set out verbatim. Further,
20 the specific terms of the alleged contract and/or warranty are not set forth in the complaint, and there
21 are insufficient allegations for the defendants to ascertain what contract or contracts are involved and
22 which provisions are claimed to have been breached.

23
24 The defendants challenge the sufficiency of the plaintiff's breach of contract and warranty
25 actions not only because the allegations do not comply with the applicable pleading standards, but
26 also because the defendants have no termite contract in plaintiff's name. Accordingly, as a practical
27 matter, the defendants are unable to determine what contract or warranty plaintiff is seeking relief
28

under. Moreover, without any ability to determine what contracts are at issue, the defendants are unable to ascertain those defenses which may be applicable, such as limitations of liability, exclusions, and disclaimers.⁴

As discussed above, *Bell Atlantic* requires a complaint with “*enough factual matter ... to suggest an agreement was made.*” *Bell Atlantic*, 127 S.Ct. at 1965 (emphasis added). The plaintiff’s claims for breach of contract and breach of warranty fall well below this standard. Even under the pre-*Bell Atlantic* jurisprudence, the plaintiff’s complaint fails to provide the defendants with adequate notice of the contractual basis for the claim. For the above reasons, plaintiff’s claims for breach of contract and breach of warranty fail to state a claim upon which relief can be granted and should be dismissed.

B. The Claim for Equitable Relief Must be Dismissed Because it is Not a Separate Cause of Action and Because Plaintiff Has Not Alleged That She Lacks an Adequate Remedy at Law.

Count Two of the plaintiff’s Complaint is entitled “Equitable Relief” and asks the Court to enjoin the defendants’ alleged wrongful conduct, order disgorgement of funds collected from plaintiff and other putative class members, and reform existing agreements “so as to comply with the law and proper conduct.” (Ex. “A,” ¶¶63-64).

“Injunctive relief, like damages, is a *remedy requested by the parties, not a separate cause of action.*” *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1272, 1283 (S.D. Cal. 2002)(emphasis in original). *See also McDowell v. Watson*, 59 Cal.App.4th 1155, 1159, 69

⁴ The only property address listed in the plaintiff’s Complaint is 14458 Wick, San Leandro. (Ex. “A,” ¶¶3, 17). Plaintiff alleges at Paragraph 3 that she resides at 14458 Wick, and in Paragraph 17, alleges that Terminix’s office is located at 14458 Wick. Terminix’s offices were formerly located at 14558 Wick (not 14458 as alleged in Paragraph 17). Further, Terminix has no record of any contract relating to 14458 Wick, where the plaintiff alleges that she resides. Terminix did have a customer account in Barbara Neu’s name relating to premises located at 16073 Gramercy Drive, San Leandro, California 94546, but it was canceled for non-payment of the annual renewal fee in May 2005. While Barbara Neu’s name appears in some of the treatment and inspection records relating to the Gramercy Drive property, the termite contract was sold to and signed by Bruce Whitney in May 1999, and that property is not mentioned anywhere in plaintiff’s Complaint. At a minimum, plaintiff should be required to identify the correct property, as well as the written contract which she is seeking relief under, so that the defendants are apprised of the contract provisions at issue and the applicable defenses.

1 Cal.Rptr.2d 692, (Cal. Ct. App. 1997)(“Injunctive relief is a remedy and not, in itself, a cause of
 2 action.”); *County of Del Norte v. City of Crescent City*, 71 Cal.App. 4th 965, 973, 84 Cal.Rptr.2d 179
 3 (Cal.Ct. App. 1999)(holding that injunctive relief is a remedy, not a cause of action, and therefore is
 4 not attendant to an underlying cause of action). Because equitable relief is not a separate cause of
 5 action, Count Two of the complaint should be dismissed.

6
 7 Plaintiff’s request for equitable relief appearing in the Prayer for Relief (Page 20 of the
 8 complaint) should be stricken because nowhere in the plaintiff’s Complaint does she allege that she
 9 lacks an adequate remedy at law. “The basis for injunctive relief in the federal courts has always
 10 been irreparable injury and the inadequacy of legal remedies.” *Lucasfilm Ltd. v. Media Market Gp.,*
 11 *Ltd.*, 182 F.Supp.2d 897, 899 (N.D. Cal. 2002), *quoting Weinberger v. Romero-Barcelo*, 456 U.S.
 12 305, 312 (1982). *See also Department of Fish and Game v. Anderson-Cottonwood Irrigation Dist.*,
 13 8 Cal.App.4th 1554, 1564, 11 Cal.Rptr.2d 222 (Cal. Ct. App. 1992)(“A party seeking injunctive relief
 14 must show the absence of an adequate remedy at law.”) Nowhere in plaintiff’s complaint does she
 15 allege that she lacks an adequate remedy at law and will suffer irreparable injury absent injunctive
 16 relief.

17
 18 Lastly, while the plaintiff seeks reformation of agreements (Ex. “A,” ¶64), that remedy is
 19 available only where, “through fraud or a mutual mistake of the parties, or a mistake of one party,
 20 which the other at the time knew or suspected, a written contract does not truly express the intention
 21 of the parties.” CAL. CIV. CODE §3399. Plaintiff has pled none of the elements required to show
 22 reformation of contract and accordingly, the plaintiff’s request for such relief should be dismissed.

23
 24 **C. Plaintiff’s Negligence Claims Are Barred By The Economic Loss Doctrine And**
 25 **Alternatively, Are Duplicative.**

26 **1. The Negligence Claims Are Barred Under the Economic Loss Doctrine.**

27 Count Three of plaintiff’s complaint alleges breach of the duty to warn, and Count Four
 28 alleges negligent training, supervision and retention. (Ex. “A,” ¶¶65-78). Each of these claims

1 should be dismissed because they seek recovery in tort for economic losses, which is prohibited
 2 under the California economic loss doctrine. Under California law, plaintiffs may seek remedies for
 3 negligence only for physical injury to person or property and not for purely economic losses. *Seely*
 4 *v. White Motor Co.*, 403 P.2d 145, 151-52 (Cal. 1965); *California Dept. of Toxic Subst. Control v.*
 5 *Payless Cleaners*, 368 F.Supp.2d 1069, 1084 (E.D. Cal. 2005). Economic damages are defined as
 6 “damages for inadequate value, cost of repair and replacement of [a] defective product, or
 7 consequent loss of profits – without any claim of personal injury or damages to other property.”
 8 *Payless Cleaners*, 368 F.Supp.2d at 1084. The economic loss rule “prevent[s] the law of contract
 9 and the law of tort from dissolving one onto the other.” *Robinson Helicopter Co., Inc. v. Dana*
 10 *Corp.*, 34 Cal. 4th 979, 988, 102 P.3d 268 (Cal. 2004).

11
 12 Plaintiff’s complaint alleges failure to properly treat and inspect for termites (*see, e.g., Ex.*
 13 “A,” ¶¶25, 28, 73-74), and consequently, the loss being claimed is presumably termite damage to
 14 plaintiff’s home due to the defendants’ alleged failure to eradicate the termites. In light of the nature
 15 of the claim and the resulting loss, this Court should find that this case falls within the contract realm
 16 of diminished expectations, rather than the accident world of tort law.

17
 18 *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 40 Cal.Rptr.3d 313
 19 (6th Dist. 2006) is similar to the instant case. and establishes that the plaintiff’s tort claims are barred
 20 by the economic loss doctrine. In *Santa Clara*, homeowners sued lead paint manufacturers,
 21 asserting that their homes were damaged by the presence of hazardous lead paint. Like the plaintiff
 22 in the instant case, there was no claim of physical injury to the plaintiffs’ premises but instead, the
 23 damages consisted of expenses incurred in repairing the homes and removing the lead paint. The
 24 court held that the cost of repairing the homes was a purely economic loss which was not
 25 recoverable in tort. *Santa Clara*, 137 Cal. App. 4th at 337-38. “[O]nly physical injury can support a
 26 negligence . . . cause of action, and cost of repair does not constitute physical injury.” *Id.*
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 28

1 This Court, like the court in *Santa Clara*, should find that plaintiff has made no allegation of
2 physical injury. Instead, the alleged failure to eradicate the termites is a purely economic loss which
3 is not recoverable in tort. Because plaintiff's negligence claims seek recovery in tort for economic
4 losses, this Court should find that those claims are barred under the economic loss doctrine.
5 Accordingly, this Court should dismiss Counts Three and Four of the plaintiff's complaint, with
6 prejudice.
7

8 **2. Counts Three and Four are Duplicative.**

9 Alternatively, should this Court find that the negligence claims are not barred in their
10 entirety, then Counts Three and Four are duplicative of one another. *See Ponce v. Lloyd*, 46 F.3d
11 1144 (9th Cir. 1995)(count properly dismissed as duplicative); *Swartz v. KPMG LLP*, 476 F.3d 756
12 (9th Cir. 2007). Count Three (entitled "Breach of Duty to Warn") and Count Four (entitled
13 "Negligent Training, Supervision and Retention") allege violation of the same common law tort
14 duty. Further, Counts Three and Four each allege various types and sub-categories of negligent
15 conduct. Accordingly, rather than being pled in separate counts, the negligence claims should be
16 pled in a single count.
17

18 **D. The UCL and CLRA Claims Lack The Required Specificity.**

19 Counts Five, Six and Seven seek recovery under Sections 17500 and 17200 of the Unfair
20 Competition Law ("UCL") and Section 1750 of the Consumer Legal Remedies Act ("CLRA").
21 Where, as here, a plaintiff alleges fraudulent conduct under the UCL or CLRA, such claims are
22 subject to the particularity requirements of Federal Rule of Civil Procedure 9(b). *Vess v. Ciba-Geigy*
23 *Corp. USA*, 317 F.3d 1097 (9th Cir. 2003). In Count Five, plaintiff alleges that the defendants
24 perpetrated a "plan and scheme" in which they disseminated "untrue or misleading" promotional
25 materials which "were and are likely to deceive the general public." (Ex. "A," ¶82). Similarly, in
26 Count Six, the plaintiff accuses the defendants of "fraudulent business practices." (Ex. "A," ¶86).
27
28

1 In Count Seven, the plaintiff accuses the defendants of a “willful and intentional” violation of CLRA
 2 Section 1770(a)(7).⁵ In light of the plaintiff’s allegations, it is clear that the plaintiff’s UCL and
 3 CLRA claims are “grounded in fraud” and therefore, under *Vess*, are subject to the particularity
 4 requirements of Rule 9(b).
 5

6 Federal Rule of Civil Procedure 9(b) provides that “[i]n all averments of fraud . . . the
 7 circumstances constituting fraud shall be stated with particularity.” FED.R.CIV. P. 9(b). This means
 8 that the plaintiff must allege “the who, what, when, where and how” of the misconduct charged.
 9 *Vess*, 317 F.3d at 1106; *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). Count Five merely
 10 alleges that the defendants prepared and distributed false promotional materials. Not only are there
 11 no specific misrepresentations alleged, but the plaintiff does not identify any specific individuals
 12 who made the alleged fraudulent statements. Nor does plaintiff identify the person or persons to
 13 whom the alleged fraudulent statements were made. Further, there are no allegations regarding
 14 when the alleged misrepresentations were purportedly made.
 15

16 Counts Six and Seven are similarly lacking in any specificity. Count Six simply claims
 17 “unfair, unlawful and fraudulent business practices” (Ex. “A,” ¶86) but does not list any particular
 18 acts or practices or when, where and by whom they were allegedly committed. Count Seven makes
 19 reference to a particular agreement, specifically, a Sentricon Subterranean Termite Protection Plan.
 20 However, plaintiff fails to attach the contract to the complaint, nor does plaintiff set out the
 21 contract’s specific terms. Count Seven is devoid of the “who, what, when, where and how” of the
 22 alleged misconduct. *Vess*, 317 F.3d at 1106; *Cooper*, 137 F.3d at 627.
 23

24 Counts Five, Six and Seven of plaintiff’s complaint contain no allegations regarding what
 25 specific misrepresentations were allegedly made, what specific information was allegedly concealed,
 26

27 ⁵ California Civil Code Section 1770(a)(7) prohibits “[r]epresenting that goods or services are of a particular standard, quality,
 28 or grade, or that goods are of a particular style or model, if they are of another.”

1 who made the alleged fraudulent statements and/or concealments, to whom the fraudulent statements
 2 were allegedly made, and when and where such misrepresentations were purportedly made. Because
 3 Counts Five, Six and Seven are devoid of any allegations regarding these required elements, this
 4 Court should find that these claims lack the level of particularity required under Rule 9(b).

5 **E. Plaintiff Has Failed to Properly Allege Claims Against the ServiceMaster**
 6 **Defendants.**

7 Plaintiff's Complaint alleges improprieties in termite protection services provided by
 8 Terminix. In addition to Terminix, plaintiff's Complaint names The ServiceMaster Company,
 9 ServiceMaster Consumer Services, Inc., and ServiceMaster Consumer Services Limited Partnership.
 10 Nowhere in the complaint does the plaintiff allege that she entered into an agreement with any of the
 11 ServiceMaster defendants. Plaintiff's allegations against the ServiceMaster defendants consist of
 12 claims that they "participate, guide and manage" the activities of Terminix, and that ServiceMaster
 13 "backs and supports" the customer guarantees allegedly provided by Terminix. (Ex. "A," ¶¶13, 15-
 14 16).

15
 16 A corporation is a legal entity separate and distinct from its shareholders, officers, directors,
 17 and other corporations with which it may be affiliated. *Say & Say, Inc. v. Ebershoff*, 20 Cal.App.4th
 18 1759, 1767-68 (Cal.Ct.App. 1993). Plaintiff's allegations that the ServiceMaster defendants
 19 "participate, guide and manage" the activities of Terminix, and that they "back and support"
 20 Terminix's customer guarantees are insufficient to hold ServiceMaster liable for the alleged conduct
 21 of Terminix and otherwise fail to state any recognized cause of action against the ServiceMaster
 22 defendants.

23
 24 **IV. CONCLUSION**

25 WHEREFORE, the defendants, TERMINIX INTERNATIONAL, INC., THE TERMINIX
 26 INTERNATIONAL COMPANY LIMITED PARTNERSHIP, THE SERVICEMASTER
 27 COMPANY, SERVICEMASTER CONSUMER SERVICES, INC., and SERVICEMASTER
 28

1 CONSUMER SERVICES LIMITED PARTNERSHIP, respectfully request that this Court enter an
2 order dismissing plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), award
3 the defendants the costs of this action and for all other just and appropriate relief.
4

5 Respectfully submitted,

6 DATED: February 29, 2008

HINSHAW & CULBERTSON LLP

8 s/Christopher Borders

9 CHRISTOPHER J. BORDERS

10 Attorneys for Defendants

11 TERMINIX INTERNATIONAL, INC.,

12 THE TERMINIX INTERNATIONAL COMPANY

13 LIMITED PARTNERSHIP (erroneously sued herein as
14 The Terminix International Company),

15 THE SERVICEMASTER COMPANY,

16 SERVICEMASTER CONSUMER SERVICES, and

17 SERVICEMASTER CONSUMER SERVICES

18 LIMITED PARTNERSHIP

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2968456 884739

**Exhibit A to Memorandum of Law in
Support of Motion to Dismiss**

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C07-06472
Case No.

BARBARA NEU on behalf of herself and
all others similarly situated,

Plaintiff,

vs.

Terminix International, Inc.,
The Terminix International Company, LP,
The ServiceMaster Company
ServiceMaster Consumer Services, Inc.,
ServiceMaster Consumer Services
Limited Partnership,

Defendants.

CLASS ACTION COMPLAINT

Demand for Jury Trial

ORIGINAL
FILED

DEC 27 2007

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

E-filing

ADP

JCS

CLAIM

I. INTRODUCTION

1. This action arises out of the pattern and practice by Defendants of failing to provide the subterranean termite prevention and control services they are required by statute, labels, good entomologic practice and contracts to provide; collecting fees for installation and maintenance of chemical barriers without fully applying or maintaining the barrier; collecting fees for periodic inspection without conducting the inspections or conducting the inspections in a such a deficient manner that it fails to satisfy the purpose of the periodic inspection; placing properties under a contract to prevent termite infestation when the company knows the manner of construction will prevent effective fulfillment of the purpose of prevention services; illegally raising annual renewal fees; and of suppressing this information to generate income without providing services.

2. Such a scheme is in violation of California Business and Professions Code Sections 17200 & 17500, California Consumer Legal Remedies Act, California Civil Code §§1750 – 1784, in breach of express and implied contracts, and common law obligations with Plaintiff and other similarly situated persons.

II. PARTIES

3. Plaintiff is an adult resident citizen of Alameda County, State of California, currently residing at 14458 Wick, San Leandro, California, 94577.

4. Plaintiff is informed and believes and thereon alleges that The Terminix International Company, LP, is or was a Delaware limited partnership based in Wilmington, Delaware, and located at 1209 Orange Street, Wilmington, Delaware, 19801, with its principal place of business in Memphis, Tennessee, that registered in California on February 3, 1987, and is routinely conducting business in California.

1 5. Plaintiff is informed and believes and thereon alleges that Terminix International,
2 Inc., is or was a Delaware corporation with its principal place of business in Memphis, Tennessee,
3 and located at 860 Ridge Lake Boulevard, Memphis, Tennessee, 38120, that registered in
4 California on February 4, 1987, and is routinely conducting business in California. Terminix
5 International, Inc. is the general partner of Terminix International, LP.
6

7 6. Plaintiff is informed and believes and thereon alleges that The ServiceMaster
8 Company is a Delaware corporation, incorporated on September 10, 1991, based in Memphis,
9 Tennessee, and located at 860 Ridge Lake Blvd, Memphis, Tennessee, 38120, that is routinely
10 conducting business in California. ServiceMaster represents itself as a "Fortune 500 Company
11 that's \$3.5 billion strong."
12

13 7. Plaintiff is informed and believes and thereon alleges that ServiceMaster
14 Consumer Services, Inc., is or was a Delaware corporation based in Memphis, Tennessee, and
15 located at 860 Ridge Lake Boulevard, Memphis, Tennessee, 38120, that registered in California
16 on March 14, 2002, and is routinely conducting business in California.
17

18 8. Plaintiff is informed and believes and thereon alleges that ServiceMaster
19 Consumer Services Limited Partnership, is or was a Delaware limited partnership based in
20 Wilmington, Delaware, and located at 1209 Orange Street, Wilmington, Delaware, 19801, that
21 registered in California on November 3, 1994, and is routinely conducting business in California.
22

23 9. The term "Plaintiff (s)" as used in this complaint means and includes all persons
24 and entities listed and named as Plaintiff in the caption of this complaint, or any amendment
25 thereto, and in the text paragraphs thereof, and include any Plaintiff hereafter added by amend-
26 ment, joinder or intervention. The term "Plaintiff (s)" also means and includes both the named
27 Plaintiff individually and as representative of the class and any subclass herein described, as well
28 as each member of such class and any subclass.

1 10. The term "Defendant" as used in this complaint means and includes all persons
2 and entities listed and named as a Defendant in the caption of this complaint or any amendment
3 thereto and in the text paragraphs thereof, and includes any Defendant hereafter added by
4 amendment or otherwise (unless otherwise specified in the amendment).

5
6 11. Plaintiff is informed and believes and thereon alleges that Defendants The
7 Terminix International Company, LP, and Terminix International, Inc., (hereinafter collectively
8 "Terminix" or the "Terminix Defendants") sell and claim to provide termite protection services
9 throughout California. The Terminix International Company, LP, is the sales and service
10 provider for the individual customers who have entered into binding contracts with The Terminix
11 International Company, LP, and/or Terminix International, Inc., by and through The Terminix
12 International Company, LP. The Terminix International Company, LP, is part of a group of
13 service providers along with Merry Maid, Furniture Medic, ARS, American Home Shield, and
14 TruGreen ChemLawn that make up the ServiceMaster Group. Terminix International, Inc., is the
15 general partner of The Terminix International Company, LP. Defendant ServiceMaster
16 Consumer Services, LP is the immediate parent to both of the Terminix Defendants and The
17 ServiceMaster Company is the ultimate Parent.

18
19 12. Plaintiff is informed and believes and thereon alleges that The ServiceMaster
20 Company, ServiceMaster Consumer Services, Inc., and/or (hereinafter collectively
21 "ServiceMaster" or the "ServiceMaster Defendants") claim and report all of Terminix's assets
22 and liabilities as part of its overall annual financial reporting.

23
24 13. The ServiceMaster Defendants, by and through their executive officers and
25 executive board, directly participate, guide, and manage all of the activities of the Terminix
26 Defendants through active and direct participation in the managerial affairs of the Terminix
27 Defendants.

14. Terminix is for all legal and practical purposes a mere department or "business unit" of ServiceMaster.

15. Terminix represents that all of the customer's services offered by Terminix are backed by the financial strength of ServiceMaster.

16. ServiceMaster publishes, backs, and supports the customer satisfaction guarantees provided by Terminix to all Terminix customers.

17. Terminix conducts business in the Northern District of California, including Alameda County, and serviced Plaintiff's property out of its office located at 14458 Wick, San Leandro, California, 94577.

JURISDICTION AND VENUE

18. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1332(d)(2). Plaintiff is a citizen of the State of California, and Defendants are incorporated in, or have their principal places of business, in the States of Delaware and Tennessee, and in this class action the aggregate amount of damages shall exceed five million dollars.

19. Venue is proper in this Court under 28 U.S.C. § 1391(a) because the events that give rise to Plaintiff's claims took place within the Northern District of California.

20. Pursuant to Civil L. R. 3-2(c), the Oakland Division of this Court is the appropriate division because a substantial part of the events that give rise to the claim occurred in Alameda County.

III. FACTS COMMON TO ALL COUNTS

21. Defendants, by and through their agents, servants, and or employees, caused Plaintiff, or Plaintiff's predecessor(s) in interest, to enter into a termite agreement/contract with

1 Defendants on or about the date that contracts and/or service orders or transfer/assignment of
2 contract requests were made (dates within the knowledge and control of the Defendants).

3 22. Defendants' contracts provide a guarantee of inspections or re-inspections,
4 treatment or re-treatment, and sometimes for repair of any termite-related damage, provided that
5 Plaintiff pays the annual renewal fee.

6 23. In consideration for said guarantee(s), Defendants were paid an initial treatment
7 fee, guarantee transfer fee and/or renewal fees.

8 24. Defendants, by and through their agents, servants, and or employees, routinely
9 performed the initial pre-treatment or post-construction treatments of properties and issued re-
10 treatment and repair guarantees. Thereafter, Defendants continually renewed the termite
11 guarantees on properties up to the present. Defendants have never disclosed that they are not
12 providing the prevention or control services promised under their written guarantees.

13 25. Defendants did not intend to fulfill the terms of their termite prevention contracts
14 at the time they entered into and renewed the agreements and failed to refund premiums and
15 charges to customers after they knew or should have known that their prior service was no longer
16 reasonably expected to be delivering a complete barrier to termite infestation

17 26. Defendants illegally raised annual renewal fees.

18 27. Defendants were uniformly obligated to provide services to protect homes from
19 termite infestation through assuring adequate inspections and the effective application and
20 maintenance of chemical barriers (in a stand alone manner or in conjunction with application of
21 alleged "baiting stations" for termites) in a uniform manner in the soil under and around the
22 foundation of the property so that the protection and future inspections could be performed in a
23 reasonable manner all in accordance with the law, label directions for termiticides and industry
24 standards. Defendants uniformly failed to perform these duties.

1 28. Defendants, by and through their agents, servants, and or employees, uniformly
2 and continuously failed to provide the necessary preventive chemical treatments, falsely claimed
3 they were using a "bait" to lure termites into poisonous traps that would lead to the death of entire
4 termite colonies, and thus failed to perform the obligations undertaken by contract and imposed
5 by law.

6
7 29. Defendants, by and through their agents, servants, and or employees, uniformly
8 and continuously failed to conduct adequate initial inspections, annual inspections, and re-
9 inspections for termite infestation or related damage and other wood destroying organisms as
10 required by contract and law and which were relied upon by Plaintiff.

11 30. Defendants, by and through their agents, servants, and or employees, uniformly
12 and continuously failed to perform the initial services that would be reasonably effective to
13 prevent subterranean termite infestation, including elimination of conducive conditions prior to
14 application of chemical or other prevention or control measures such as alterations to structures or
15 foundation areas so as to make application of a complete chemical barrier an effective
16 preventative or control measure against termites, and failure to apply chemical as required by
17 labels and good practice and company policy and failure to reapply chemicals when disruption of
18 barriers occurred.

19
20 31. Defendants, by and through their agents, servants, and or employees, uniformly
21 failed to inform customers that they would not maintain the chemical barrier after the product was
22 believed to have worn off and instead continued to collect annual renewal premiums for the
23 protection service when they knew any chemical barriers they applied had worn off and that the
24 basic prevention service offered by the contract was not being provided.

25
26 32. Defendants, by and through their agents, servants, and or employees, intentionally
27 created a scheme and system which has promoted and led to widespread negligence, recklessness
28

1 and wantonness in the manner of termite prevention services and inspections, annual inspections,
2 re-inspections and certifications thereof.

3 33. Defendants, by and through their agents, servants, and or employees, engaged in a
4 practice of representing that they had developed a system that would "lure" termites to stations
5 containing a poison "bait" that would eliminate termite colonies when they knew that because of
6 the random foraging patterns of subterranean termite colonies, the wood in plastic tubes laced in
7 the ground did not act as a lure or bait for termites. Defendants knew the product did not "bait"
8 termites but instead that termites would have to randomly stumble upon the "traps" to have any
9 effect and that disturbing infested wooden stations could cause termites to abandon the site, and
10 falsely advertised and sold prevention and control services as baits without providing bait for
11 termites
12

13
14 34. The Defendants followed a practice of including definitions with repair contracts
15 in combination with business practices that would cause the conditions for coverage not to be
16 met, which is and was a deceptive and unfair practice. For example, the repair promise was
17 conditioned upon a Terminix employee finding live termites when the practice of the company
18 was to kill live termites before the extent of live termites could be discovered by the property
19 owner and when termites could damage wood during the contract term without being present at
20 the time of inspection.
21

22 35. Defendants, by and through their agents, servants, and or employees,
23 intentionally, recklessly, wantonly and/or negligently suppressed the fact that the entirety of
24 Plaintiff's house had not received the termite treatment for which Plaintiff had contracted at the
25 beginning of the relationship. Defendants have refused to make proper remedial treatments
26 and/or repairs to the home every day since the original treatment, causing a new breach or tort
27 each day thereafter through a course of active concealment of wrongdoing in the face of a duty of
28

1 disclosure and, therefore, has lulled the Plaintiff and class members into believing the property
2 received the service promised.

3 36. Defendants routinely followed a practice of including unfair, illegal, and
4 unconscionable clauses in their consumer contracts such as remedy stripping clauses and
5 arbitration clauses containing class action bans and limitations on remedies. Clauses containing
6 these types of restrictions are unconscionable and unenforceable under California Law.
7

8 37. ServiceMaster uniformly and continuously controlled and directed the
9 aforementioned conduct and omissions of Terminix.

10 38. The foregoing activities, concealment, and patterns and practices, have been
11 known to, authorized, directed and controlled by, ServiceMaster and have been sanctioned,
12 approved and/or condoned, and allowed to continue even after investigating said alleged
13 practices.
14

15 39. Defendants, by and through their agents, servants, and or employees, have held
16 themselves out to Plaintiff, or their predecessor(s) in interest, as being experts in the field of
17 termite infestation treatment and inspection in advertisements and other publications directed at
18 the residents of this state and by virtue of the activities they undertook as licensed Structural Pest
19 Control Operators ("SPCO's").
20

21 40. Defendants uniformly represented in standardized printed material and by their
22 actions that Plaintiff's property had been properly treated and otherwise protected from termite
23 infestation using the highest standards and that services were provided in compliance with law.

24 41. Defendants have preyed upon and exploited the Plaintiff's lack of expertise, as it
25 relates to proper termite treatment, inspection, re-inspection and re-treatment.
26
27
28

1 42. Defendants actively concealed their practices, schemes and wrongdoing, took steps
2 to make it appear as if there was no wrongdoing, and engaged in other activities by reason of
3 which the tolling of all applicable statutes of limitation is appropriate and required.

4 **IV. CLASS ACTION ALLEGATIONS**

5 43. This action is brought by the named Plaintiff as a class action, on her own behalf
6 and on behalf of all others similarly situated ("the Class"), under the provisions of Rule 23 of the
7 Federal Rules of Civil Procedure.

8 44. The Class is comprised of all individuals, proprietorships, partnerships,
9 corporations, and other entities (hereinafter 'persons and entities') that own any home,
10 condominium, apartment complex, commercial building, or other structure, and/or improvements
11 to real property (hereinafter referred to as "structure") located in the State of California who have
12 purchased contracts and/or warranties from Defendants for termite control service or whose
13 contracts with other providers have been purchased or assumed by Defendants, which contain
14 provisions substantially similar to Plaintiff's. Excluded from the Class are all claims by any
15 persons or entities that have already commenced an individual civil action against Defendants
16 related to the subject matter of this litigation. Also excluded from the Class are the following:
17 Defendants; any parent, subsidiary, affiliate, or controlled person of Defendants; the officers,
18 directors, agents, servants or employees of any of the same; persons whose participation as a class
19 representative or member would require recusal of the hearing officer; members of the judiciary
20 assigned to this case and their relatives within the second degree of consanguinity; and, the
21 members of the immediate families of any such person.

22 45. This action has been brought and may properly be maintained as a class action
23 under California law.
24
25
26
27
28

1 46. Plaintiff is unable to state precisely the size of the Class, but is informed and
2 believes that members of the Class number at least into the thousands. The Class is sufficiently
3 numerous and dispersed throughout the state that joinder of all its members is impractical.

4 47. There are numerous common questions of law and fact with respect to Defendants
5 and their contracts involving the Class members. Among these questions common to the Class
6 are:
7

8 (a) Whether Defendants provided necessary services for the control,
9 prevention, eradication, and inspection for termites;

10 (b) Whether Defendants, with respect to their contract for service, were
11 negligent in the execution of the service that they were to provide and/or failed to
12 provide the services promised or otherwise required;

13 (c) Whether Defendants collected money without providing the services they
14 were obligated to provide;

15 (d) Whether Defendants engaged in a pattern and practice of replacing existing
16 service contracts with other service contracts to improperly excuse prior breaches
17 of duties, limit liability, discourage collectively seeking remedies that may be
18 infeasible to seek individually, and with other terms more favorable to Defendants;

19 (e) Whether Defendants illegally raised and collected annual renewal fees;

20 (f) Whether Plaintiff and class members are entitled to recover compensatory
21 damages;

22 (g) Whether Plaintiff and class members are entitled to recover equitable
23 relief;

24 (h) Whether Plaintiff and class members are entitled to recover punitive
25 damages; and
26
27
28

1 (i) Whether contracts should be equitably reformed;

2 48. Class action treatment provides a fair and effectual method for the adjudication of
3 the controversy here described, affecting a large number of persons, the joinder of whom is
4 impracticable. The class action provides an effective method whereby the enforcement of the
5 rights of Plaintiff and members of the Class can be fairly managed without unnecessary expense
6 or duplication.
7

8 49. If Class members were to pursue individual litigation, it would be unduly
9 burdensome to the courts within which the individual litigation would proceed. Individual
10 litigation would magnify the delay and expense to all parties in the court system by resolving the
11 controversy engendered by Defendants' course of conduct with respect of its contract. By
12 contrast, the class action device presents far fewer management difficulties and provides the
13 benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single
14 court. Concentrating this litigation in one forum will aid judicial economy and efficiency,
15 promote parity among the claims of the individual Class members and result in judicial
16 consistency. Notice of the pendency and any resolution of this action can be provided to the
17 Class members by publication and direct mailing upon discovery of Defendants' files.
18

19 50. The expense and burden of individual litigation of a case of this magnitude make it
20 impractical for individual Class members to seek redress for the wrongs done to them and
21 therefore requires consolidation of all such claims in one action.
22

23 51. The claims of Plaintiff, as the Class Representative, are typical of the claims of the
24 members of the Class.

25 52. Plaintiff will fairly and adequately protect the interests of the Class she represents.
26 The interests of Plaintiff, as the Class Representative, are consistent with those of the members of
27
28

1 the Class. In addition, Plaintiff is represented by experienced and able counsel who have
2 represented Plaintiffs classes in similar litigation.

3 53. Plaintiff and class members envision no unusual difficulty in the management of
4 this action as a Class action.

5 54. Plaintiff and the Class had no knowledge of Defendants' wrongdoing alleged
6 herein and could not have discovered the true nature of Defendants' acts at any time prior to the
7 filing of this complaint by exercise of due diligence because of the concealment of the
8 wrongdoing by Defendants. Accordingly, Plaintiff's claims alleged herein are not barred by any
9 applicable statute of limitations.
10

11 **COUNT ONE**

12 **Breach of Contract and Warranty**

13 55. The preceding paragraphs of this Complaint, and any additional factual averments
14 set forth in any subsequent sections of this Complaint, are deemed to be repeated and incorporat-
15 ed by reference in this Count.
16

17 56. Plaintiff and the Class entered into written contracts with Defendants and
18 undertook obligations, paying premiums in full, renewing annually, and fully performed all
19 obligations under the contracts.

20 57. The conduct herein alleged breaches, and has breached, the provisions of
21 Defendants' contracts with Plaintiff and the Class and Plaintiff's and the Class' predecessor(s) in
22 interest, and the standardized warranties afforded Plaintiff and the Class under their contracts.
23

24 58. Plaintiff and class members have incurred damages proximately caused by
25 Defendant's breaches of statutory and contractual duty, breaches of warranty, and misconduct
26 described herein.

27 **COUNT TWO**

28 **Equitable Relief**

1 59. The preceding paragraphs of this Complaint, and any additional factual averments
2
3 set forth in any subsequent sections of this Complaint, are deemed to be repeated and
4
5 incorporated by reference in this Count.

6 60. By virtue of entering into contracts with Plaintiff and the Class, and Plaintiff's and
7
8 the Class' predecessor(s) in interest, Defendants were obligated to express covenants and further
9
10 obligated to the implied covenant of good faith and fair dealing inherent in the making of any
11
12 such contract.

13 61. Defendants acted with a malicious, reckless or negligent intent to deprive Plaintiff
14
15 and the Class members of the agreed to services they had contracted to undertake, with a motive
16
17 to profit for themselves and to the detriment of the Class.

18 62. Defendants acted with knowledge and intent that their acts and omissions would
19
20 violate the aforesaid express and implied covenants and would frustrate the goals and objectives
21
22 inherent in said contracts.

23 63. In equity, the Court should enjoin such continued wrongful conduct and order
24
25 disgorgement of all monies wrongfully collected from Plaintiff and the Class plus interest.

26 64. In equity, the Court should reform existing customer agreements and Defendants'
27
28 business practices so as to comply with law and proper conduct as well as any other equitable
29
30 remedy deemed appropriate by this Court.

COUNT THREE

Breach of Duty to Warn

31 65. The preceding paragraphs of this Complaint, and any additional factual averments
32
33 set forth in any subsequent sections of this Complaint, are deemed to be repeated and
34
35 incorporated by reference in this Count.

1 termite investigations and use and/or apply chemicals, devices or systems to prevent infestation
2 upon whom Defendants and their employees knew Plaintiff and the Class members would
3 reasonably rely in deciding to protect their homes.

4 74. Defendants breached their duty by failing to provide adequate supervision of their
5 employees, of their dealings with the public.

6 75. Defendants breached their duty by negligently retaining employees known to have
7 acted or refused to act as specified above or who were known to have violated Defendant's stated
8 company policies and procedures regarding treatments and inspections.

9 76. Defendant's negligent retention of employees known to have engaged in the
10 misconduct described herein acted as ratification of such misconduct.

11 77. Defendants knew, or should have known, of the wrongful practices engaged in by
12 their employees, and knew or should have known that their own training, supervision and
13 retention practices were inadequate to fulfill their obligation to protect the public from
14 unscrupulous, dishonest, and deceptive practices by their agents and employees.

15 78. Plaintiff and class members have incurred damages proximately caused by
16 Defendant's negligence in training, supervising, and retaining their employees, breaches of
17 statutory and contractual duty, and misconduct described herein.

18 **COUNT FIVE**

19 **California UCL**
20 **(Business and Professions Code § 17500 *et seq.*)**

21 79. The preceding paragraphs of this Complaint, and any additional factual averments
22 set forth in any subsequent sections of this Complaint, are deemed to be repeated and
23 incorporated by reference in this Count.

24 80. Plaintiff asserts this cause of action for violations of Business and Professions
25 Code § 17500.

1 81. Advertisements and inducements were made within the State of California and
2 County of Alameda and come within the definition of advertisements as contained in Business
3 and Professions Code § 17500 in that such promotional materials are an inducement to the public
4 to purchase the services described herein, and are statements disseminated by Defendants to the
5 general public. Defendants have illegally retained payments for services or goods they did not
6 supply.

7
8 82. In furtherance of said plan and scheme, Defendants have prepared and distributed
9 within the State of California false promotional materials soliciting clients to purchase termite
10 service contracts that they had no intention of performing as they represented and implied they
11 would do. The above acts of Defendants, in disseminating said statements throughout the State of
12 California and to the general public thereof, were and are untrue or misleading, and therefore
13 were and are likely to deceive the general public of the State of California by obfuscating the
14 nature of termite protection and what service is actually required to protect consumers' property
15 from termites, all in violation of California Business and Professions Code § 17500.

16
17 83. As a result of the above violations of Business and Professions Code § 17500,
18 Plaintiff, on behalf of the People of the State of California pursuant to Business and Professions
19 Code § 17535, are entitled to an order of this court enjoining such future conduct on the parts of
20 Defendants, and such other orders and judgments which may be necessary, including the
21 appointment of a receiver, to restore to any person in interest any money paid for services that
22 were not provided, as a result of the acts of Defendants.
23
24
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28

COUNT SIX

**California UCL
(Business and Professions Code § 17200 *et seq.*)**

84. The preceding paragraphs of this Complaint, and any additional factual averments set forth in any subsequent sections of this Complaint, are deemed to be repeated and incorporated by reference in this Count.

85. Plaintiff and the class assert this cause of action seeking equitable relief for violations of Business and Professions Code §§ 17200 and 17500.

86. Such acts of Defendants as described above constitute unfair, unlawful and fraudulent business practices and constitute violations of California Business and Professions Code §§ 17200 and 17500.

87. As a result of the business practices described above, Plaintiff, on behalf of the People of the State of California and pursuant to Business and Professions Code § 17203 are entitled to an order enjoining such future conduct on the part of Defendants, and such other orders and judgments which may be necessary, including the appointment of a receiver, to restore to any person in interest any money, as a result of the acts of Defendants.

COUNT SEVEN

Violation of Consumers Legal Remedies Act (Civil Code §1750, *et seq.*) – All Defendants

88. The preceding paragraphs of this Complaint, and any additional factual averments set forth in any subsequent sections of this Complaint, are deemed to be repeated and incorporated by reference in this Count.

89. In or around July of 1999, Defendants sold to Plaintiff a termite control plan called "Sentricon Subterranean Termite Protection Plan."

90. The termite control plan was bought by Plaintiff primarily for personal, family, or

1 household purposes.

2
3 91. At the time of the sale, Defendants represented to Plaintiff, in a writing entitled
4 "Sentricon Subterranean Termite Protection Plan," that the termite service contract would kill
5 termites that attempted to infest Plaintiff's dwelling and that the regularly scheduled maintenance
6 was necessary to maintain this protection. In fact, the termite control plan was substantially
7 defective in that the protection offered did not kill termites and the regular maintenance offered
8 no additional protection.

9
10 92. Plaintiff is informed and believes and thereon alleges that the above-mentioned
11 misrepresentation was intended by Defendants to result in the above-mentioned sale of the termite
12 service contract to Plaintiff, and Plaintiff alleges that the above-mentioned purchase of the termite
13 control plan was made in reliance on, and as a result of, the representation of Defendants that
14 such termite control plan was free from any substantial defects.

15
16 93. Plaintiff is informed and believes and thereon alleges that the above-mentioned
17 misrepresentation was a willful and intentional violation of the provisions of Civil Code Section
18 1770(a)(7) and that such violation was not the result of a bona fide error notwithstanding the use
19 of reasonable procedures adopted to avoid any such error.

20
21 94. On or about August 3, 2007, Plaintiff sent to Defendant a written Notice and
22 Demand, by certified mail, return receipt requested, to Defendant's business address set forth in
23 the "Sentricon Subterranean Termite Protection Plan" which Notice and Demand notified
24 Defendant of the above-mentioned violation of Civil Code Section 1770(a)(7) that resulted in the
25 sale of the termite control plan to Plaintiff and demanded that Defendant correct, repair, replace,
26 or otherwise rectify the termite control plan purchased by Plaintiff and sold in violation of this
27 section.
28

1 95. Within 30 days of the Defendants' receipt of the Notice and Demand, Defendants
2 failed to correct, repair, replace, or otherwise rectify, and failed to agree to correct, repair,
3 replace, or otherwise rectify within a reasonable time, the above-mentioned termite control plan.
4

5 96. By reason of the above-mentioned violation of Civil Code Section 1770(a)(7),
6 Plaintiff has been injured in that Plaintiff was obliged to and did pay Defendants for a plan that
7 was promised to provide a benefit that it, in fact, failed to provide.
8

9 **PRAYER FOR RELIEF**

10 WHEREFORE, the foregoing averments considered, Plaintiff demands judgment for
11 herself and for each members of the proposed Class as follows:

12 (A) Compensatory damages against Defendants according to proof.

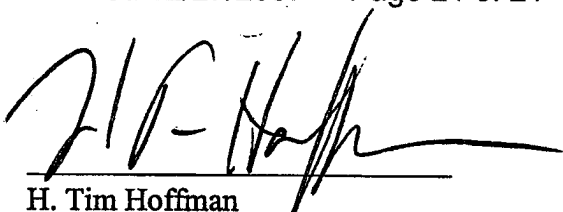
13 (B) Incidental, consequential and punitive damages against Defendants according to
14 proof.

15 (C) Equitable relief against Defendants in accordance with proof.

16 (D) An order that Defendants compensate Plaintiff and the Class for all reasonable fees
17 and costs incurred in this litigation, including but not limited to the cost of retaining any expert
18 and all discovery and deposition costs and expenses, and other costs of this litigation, as costs of
19 this action, and awarding Plaintiff and the Class their reasonable attorneys' fees and expenses of
20 this action; and
21

22 (E) Granting such other and further relief, including, without limitation, injunctive
23 relief, declaratory relief, specific performance relief and other forms of equitable relief, as may be
24 just, premises considered.
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2 Dated: December 26, 2007



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